No. 82-1020

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

TINY SMITH,

Petitioner,

v.

SOUTHERN RAILWAY COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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January 1983

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QUESTION PRESENTED

The court below reversed judgments for petitioner on each of three counts. The petition presents the question whether the court applied a theory not advanced below in reversing the judgment on one of the three counts.

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OPINION BELOW

The opinion of the District Court for the District of South Carolina denying respondent's motion for judgment n.o.v. and for a new trial, set out in the Appendix to the petition at pages 36-49, is not reported. The opinion of

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* The listing of parent, subsidiaries and affiliates required by Rule 22.2 is as follows:

Norfolk Southern Railway Company (parent)
Algers, Winslow and Western Railway Company
Atlantic and North Carolina Railroad Company

the Court of Appeals for the Fourth Circuit, set out in the Appendix to the petition at pages 50-77, will not be reported. See 691 F.2d 497.

JURISDICTION

The decision of the Court of Appeals was entered on September 20, 1982 (App. to Pet., p. 50). A petition for

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Augusta and Summerville Railroad Company
Beaver Street Power Company
Carolina and Northwestern Railway Company
Central of Georgia Railroad Company
Central Transfer Railway and Storage Company
Chatham Terminal Company
Cincinnati Southern Railway
1575 Eye Street Associates
High Point, Randleman, Asheboro and Southern Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
Norfolk Southern Corporation
The North Carolina Midland Railroad Company
The North Carolina Railroad Company
North Charleston Terminal Company
Pine Brook Center Limited
Queen City Developers
Richmond, Fredericksburg and Potomac Railroad Company
Richmond-Washington Company
700 North Fairfax Street Limited Partnership
The South Western Rail Road Company
State University Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Woodstock & Blocton Railway Company
Yadkin Railroad Company

rehearing filed on September 29, 1982, was denied on October 22, 1982 (App. to Pet. p. 128), and judgment was entered on November 8, 1982 (App. to Pet. p. 129). The petition for a writ of certiorari was filed on December 16, 1982. Jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATEMENT

On May 21, 1979 petitioner (hereafter Smith) filed suit against respondent (hereafter Southern), alleging two counts of malicious prosecution, two counts of malicious abuse of process, and one count of tortious interference with a contract. The two counts for malicious abuse of process were dismissed on summary judgment; the remaining counts were tried, resulting in a judgment for Smith of $490,150 damages, plus $866,000 punitive damages. Southern's motion for judgment n.o.v. was denied. Reviewing the record, the Court of Appeals reversed, concluding, unanimously, that, taking the evidence most favorably to Smith, it did not warrant a recovery.

The facts are set out in some detail in the opinion of the court below (App. to Pet. pp. 50-77). They may be summarized as follows:[1]

Smith is the owner and operator of Tiny Smith Excavating Company, which had been employed by Southern for some years as an independent contractor or "vendor" (supplier of goods and services). His company supplied heavy equipment at train derailment sites, and was

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[1] As the court below noted, some of the evidence most relevant to Southern's defense was apparently excluded by the trial court (App. to Pet. p. 76n.). Except as specifically noted, our summary follows the example of the court below and is confined to evidence submitted to the jury.

also under contract with Southern to maintain a trash dump, for which he was paid $2,000 per month.

As to the alleged malicious prosecutions. In 1976, Southern's railway police discovered that false invoices received and approved by Southern employees had defrauded it of large sums of money. The railway police informed Postal Inspector Kay, who continued the investigation with their assistance.

One aspect of the investigation that centered on Smith concerned an invoice for a five-ton air conditioner that had been billed by Smith to Southern. No such air conditioner could be found on Southern's property, but the same device as that billed to Southern had been installed in the home of a supplier to Southern named Ridgill. The company that installed it had sent the bill to Smith. At the request of a Southern master mechanic named Edwards, Smith had paid the bill, and, after adding a 10 percent "handling" fee, invoiced the air conditioner to Southern on his own invoice, where it was approved by Edwards and paid. Smith, during this period, had made payments to five Southern supervisory employees, including several checks to Edwards for a total of $5,200, which Smith claimed were loans. The trial court inexplicably excluded evidence that a railroad employee named Shoemake, who, like Edwards, had authority to approve invoices, and who had received money from Smith, confessed that he had been told by Smith that he would not have to repay the money if he would approve invoices padded by Smith for the amount of the loans. At the trial, Shoemake recanted the confession. A grand jury returned indictments against Edwards, Ridgill and Smith in connection with this transaction. Edwards and Ridgill were convicted, Smith was acquitted. This was the basis of his first claim of malicious prosecution.

The investigation also revealed that with respect to 40 invoices that Smith had submitted for work at derailment sites and which had been approved for payment by Edwards, neither Smith nor his equipment had been at 33 of them. When interviewed by Postal Inspector Kay and railway police officers, Smith asserted that he had in fact been at almost all of the derailments for which he submitted invoices, except for those where he was called but the job was completed before he arrived, when he would bill for his time. At the trial, Smith gave two versions of the interview, one corresponding to that just stated, and the other that he had been to few of the derailments but had performed the services working on Southern's trash dump (for which he was already under contract at $2,000 per month).

In January 1977, prior to the trial of Smith and Edwards on the false invoices, a meeting was held in the office of one of the defendant's attorneys with the Assistant United States Attorney in charge of the prosecution, Postal Inspector Kay, Southern police officers, the attorneys for Edwards, Ridgill and Smith, and both Edwards and Smith. The purpose of the meeting was to tell the prosecutors of their defense that "swapping" jobs to avoid budget problems was common practice. As a result of the meeting, the Assistant United States Attorney and Postal Inspector Kay undertook a further investigation to determine if in fact job-swapping was indeed a common practice. They interviewed a Southern master mechanic in the Macon territory, comparable to the South Carolina territory, as well as Edwards' successor. Both stated that no such common practice existed, although the Macon employee stated that it sometimes was done for small amounts which would not total $500 in a year. (The 21 false invoices upon which Edwards and Smith were tried totaled $9,294.) As a result, the Assistant United States

Attorney determined that the asserted defense was without merit, and went forward with the prosecution. As with the air conditioner indictment, only Postal Inspector Kay appeared before the grand jury. Both Edwards and Smith were acquitted. This is the basis for Smith's second count of malicious prosecution.

As to alleged tortious interference with a contract. Southern's increasing awareness as a result of the investigations of Smith's association with incidents of fraud against it prompted Southern to inform the local officers of its purchasing departments not to do further business with Smith. However, shortly after Smith's criminal trials, Brason Construction Company agreed to pay Smith $30 per hour for his services and the use of his equipment on a job that Brason was doing for Southern in its Savannah yard. In February 1979 a Southern employee discovered that Smith was workig for Brason, and immediately asked Brason to remove Smith from Southern's property. Brason did so. This is the basis for Smith's count for tortious interference.

Southern's contract with Brason gave it the right to approve any subcontractor. Although Smith testified that he was an independent contractor, the trial court ruled as a matter of law that he was a Brason employee. Reviewing the evidence, the court below concluded that he was probably an independent contractor, whom Southern could have removed for no reason as he had not been approved by it, but that even if he were an employee, in view of all that Southern knew, Southern was not required to permit Smith to work on its property.

REASONS FOR DENYING THE WRIT

The petition for certiorari asserts, in several contexts, only one contention: did the court below decide the case

on a different theory of defense than that asserted at trial. Even were the contention true, as it is not, the petition would present no issue of general importance warranting review by this Court.

Smith's charge of malicious prosecution rests on his assertion that no probable cause existed for his indictment. As the court below pointed out, his indictment by a grand jury is *prima facie* evidence of probable cause. *White* v. *Coleman*, 277 F. Supp. 292 (D. S.C. 1967); *Kinton* v. *Mobile Homes Industries, Inc.*, 274 S.C. 129, 262 S.E. 2d 727 (1980). To rebut this, Smith asserted that Southern's railway police had intentionally and maliciously withheld from the prosecuting authorities knowledge they had of a common practice of so-called "job-swapping"—the submission of bills or invoices for work not performed but allegedly offset by work done elsewhere to accommodate alleged budgetary restrictions—and that if the prosecuting authorities had been informed of this, they would not have prosecuted. The court below concluded, after a review of the record, that the testimony of the railway police that they had no knowledge that any such practice was common, except for isolated instances, was essentially uncontradicted, and that Smith's assertion failed.

The petition asserts that this reference by the court below to the lack of knowledge by the railway police officers of a common practice of job-swapping injected a new theory into the case. The assertion is, almost, absurd. The railway police officers were the only Southern employees who had any contact with the prosecuting authorities, and the only ones who could have intentionally and maliciously withheld information. The railway police officers were called to testify at the trial as to their lack of knowledge of the alleged common practice. South-

ern's whole defense to Smith's claim was that information about the alleged common practice could not have been withheld by its police officers because there was no such common practice—indeed, that the prosecuting authorities had been made aware of Smith's contention and had made their own investigation to satisfy themselves that prosecution was warranted. To now assert that reliance by the court below on the lack of knowledge of Southern's railway police officers is to ignore the entire basis upon which Southern defended the action.

It is appropriate to add that the petition does not challenge the reversal by the court below of Smith's judgment for tortious interference with a contract, and indeed that its contention applies only to the malicious prosecution charge based on the false invoices for derailment work. The petition has no application to the malicious prosecution charge relating to the air conditioner. As the court below pointed out (App. to Pet., pp. 68-69), no one ever asserted that there was a common practice of billing Southern for material it never received; therefore, there could be no malicious withholding of a non-existent practice.

CONCLUSION

The petition wholly fails to satisfy the requirements justifying the grant of a petition for certiorari, as set out in Rule 17(a) or (c). It fails to challenge two of the three conclusions of the court below, and makes no credible

challenge to the third. The petition for certiorari should be denied.

Respectfully submitted,

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